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Lupton, Michael

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The Post-Mortem Use of Sperm – Some Clarity at Last

This article is dedicated to Emeritus Professor Mary Hiscock, my dear friend and colleague for the past 25 years.

Professor Michael Lupton *

Abstract

The case of *Re Cresswell* [2018] QSC 142. dealt with an application by Ayla Cresswell for consent to use the gametes of her partner, Joshua Davies, who had committed suicide.

The decision was a single judge decision handed down by Justice Anne Brown and was limited to the above issue. A major complication in deciding the case was the fact that Joshua Davies had not given clear instructions about the withdrawal and use of his gametes prior to his death. Where such consent is lacking a court must address the following three issues in its judgement.

- (a) Retrieval of the gametes.
- (b) Storage of the gametes.
- (c) Use of the gametes.

1. Retrieval

Justice Susan Brown made it clear in her judgement that the appropriate course to obtain consent for retrieval was not to embark on a Supreme Court application, but rather to follow the procedures set out under the Transplantation and Anatomy Act 1979 (Qld). If the death (Joshua's) fell within the jurisdiction of the Coroner, then it is the Coroner's consent which must be sought. Having obtained this consent, consent for the actual retrieval must be obtained from the senior available next of kin, which in this case was his partner Ms Ayla Cresswell.

2. Storage.

Queensland is one of the Australian States which does not have an Assisted Reproduction Act. This means that conditions for the retrieval and use of gametes is not regulated by statute but are instead, dealt with in terms of the National Health and Medical Research Council's (NHMRC) Ethical Guidelines, on the Use of Assisted Reproductive Technology and Clinical Practice and Research (2017).

In terms of these guidelines all IVF Clinics in Australia must comply with these guidelines. Justice Brown highlighted the fact that the assumption that a court order for removal was required in terms of the guidelines was fallacious, and that in fact, the court does not have jurisdiction in this matter. Application for retrieval is limited to the following:-

- (i) *The deceased's spouse or partner.*

- (ii) *The surviving spouse must intend to use the gametes for procreation purposes.*
- (iii) *Evidence of positive support from the deceased to use his gametes must be forthcoming, as is consent from the surviving partner or spouse.*

3. Posthumous Use.

Any clear evidence of objection to the posthumous use of his gametes must be respected.

If there is no evidence of objection to use of use of his gametes, then evidence of the partner's consent to the use of his gametes must be forthcoming as is the consent of the surviving partner or spouse.

4. Conclusion

It is submitted that in order to avoid the problems encountered in Cresswell's case, newly married couples should include all the necessary consents regarding the post-mortem use of gametes in their wills.

1. Introduction.

The thorough and in-depth analysis of a range of judgements across various state jurisdictions by Brown J in the case of *Re Cresswell*¹ has, I submit, finally delivered some welcome clarity to the previously confused area of post-mortem use of a deceased's sperm by a surviving wife/partner. In order to arrive at his decision, Brown J first had to decide the contentious point as to whether a party is entitled to the use and possession of the contested sperm. This decision is in turn informed by whether sperm can be characterised as property. It is also clear from Brown J's analysis of an extensive list of Australian cases that most judgements testify to a two-stage process viz first consent from a court to remove the deceased's sperm and deposit it with a cryo-preservation unit, and later² a second application for further consent to access and use the frozen sperm for insemination purposes.³

2. The Protagonists.

Ms. Ayla Cresswell, the applicant in this case, had enjoyed a three-year relationship with the deceased Mr. Joshua Davies, when without any apparent warning signs, he took his own life on 23 August 2016.

Joshua Davies died intestate. No administrator or personal representative was appointed to his estate nor did he leave any oral or written indication of his testamentary intentions. The couple had lived together for 8 months and had discussed getting married and having a family and were

* Faculty of Law, Bond University, Gold Coast, Queensland.

¹ *Re Cresswell* [2018] QSC 142

² Transplantation and Anatomy Act 1979 (Qld), hereinafter the TAA.

³ see *Cresswell* at para 3

saving for a house⁴. The chain of events leading to the application order for the removal of Joshua Davies' sperm and the subsequent application for the right to use his sperm was triggered by Ms. Cresswell indicating to Joshua's father Mr. John Davies, on the day of his death, that she wished she was pregnant. This prompted Davies snr to ring the Toowoomba Base hospital to inform them of his intention to recover some of his son's sperm. He also sought advice as to how to obtain the necessary consent to remove Joshua's sperm. An urgent application was lodged in the Queensland Supreme Court on 24th August 2016 to sanction the removal of the testes and spermatozoa of Joshua Davies.⁵

Cresswell's application was supported by both Joshua's parents as well as by Cresswell's parents and close friends.

The Queensland Supreme Court granted an order in favour of the applicant and Joshua's sperm now resides in the possession of the Queensland Fertility Group who are storing it in a cryo-preserved state.⁶

In the course of the application to remove the sperm, the parties accepted that the court's *parens patriae* jurisdiction was not applicable to the removal of the sperm from a deceased person. The parties were however at odds as to whether the *Transplantation and Anatomy Act*⁷ applied to the posthumous retrieval of gametes. The Attorney General submitted that it did apply, while Ms. Cresswell submitted that the sperm was removed for the purpose of preserving the sperm and therefore for that reason permission under the *Transplantation and Anatomy Act* was not required.⁸

3. The Judgement

3.1 Validity of the Court Order to remove Joshua Davies' sperm.

The first issue which was canvassed by the Court was whether an earlier decision by the Queensland Supreme Court sanctioning the removal of Joshua's sperm was within that court's power given the diversity of authority in Queensland on this point. Brown J's decision to clarify the law in this regard is appropriate and useful.

3.1.1. Queensland Precedent

a) There was strong precedent to the effect that the court had no power to order the removal of sperm. This precedent was upheld in the following cases:-

a.a) *Re Gray*⁹

In Gray's case, the facts of which mirror the Cresswell case, Chesterman J refused an application

⁴ See Cresswell at paras 6-8

⁵ See Cresswell supra

⁶ See Cresswell supra.

⁷ 1979 (Qld) "The TAA"

⁸ Re Cresswell, op cit, para 14-15

⁹ [2001] 2 Qd R35

made on behalf of the wife of the deceased who had died unexpectedly in his sleep. He had not discussed the possibility of his sperm being used after his death by his wife. Nor had he left any written instructions in this respect. He died intestate. The court made the following findings in Gray's case:-

- (i) It refused the wife's application.
- (ii) The wife's submission that the court had jurisdiction in terms of s 8 of the Supreme Court Act 1991 Qld. or alternatively in terms of its inherent *parens patriae* jurisdiction was also rejected.
- (iii) The court held that at common law there was no property in a corpse other than a right of possession for the purposes of burial.¹⁰
- (iv) That s 236 of the Criminal code lent itself to the interpretation that it could be contravened by virtue of the body of the deceased being interfered with in the process of extracting sperm from it.
- (v) Chesterman J also found that the TAA had no application because the removal of tissue under this Act must be for the purpose of transplantation into a living person for therapeutic medical or scientific purposes.¹¹

b.b) *Baker v State of Queensland*¹²

In his judgement in the above case Muir J rejected a submission by the applicant that the stated intentions of herself and her deceased spouse to have children was analogous to a contract to deal with property and was thus capable of enforcement. Instead he concurred with Chesterman J's judgement in *Re Gray*. He rejected the application and opined that any change in the law fell to the legislature to effect.¹³

c.c) *AB v Attorney General*¹⁴

In this case Hargrave J held that a court had no power deriving from common law, to allow the interference with a corpse, which is what removal of sperm constituted. He held that the integrity of a corpse was inviolable, and that removing sperm constituted a violation of said corpse. This case also endorsed the finding in *Re Gray*.¹⁵

b) Does the Court have power to order the removal of sperm?

b.b) *Re Denman*¹⁶

In this matter Atkinson J rejected *Gray* and *Baker* by reason of the fact that she considered that

¹⁰ See SG Hulme "Dead Bodies" 1956 *Sydney Law Review*

¹¹ See above at 35 in case of *Re Gray*

¹² [2003] QSC 002

¹³ [2005] 12 VR 485

¹⁴ *ibid*

¹⁵ [2004] 2 Qd R 595.

¹⁶ [2004] 2 Qd R 595

the court did in fact have jurisdiction to allow behavior which was not unlawful. Her Honour was also unconvinced that the removal of sperm at the request of the widow from the body of her deceased spouse constituted an offence in terms of s 236 of the Criminal Code, if such removal followed prior discussion and agreement between the spouses to have children.¹⁷

As a consequence of the finding above, her Honour was able to decide that ‘the court has the inherent jurisdiction to allow behaviour which is not unlawful.’¹⁸

Given the short lifespan of a deceased’s sperm, the balance of convenience dictated that the sperm should be allowed to be harvested.

Atkinson J’s approach in *Denman* was also followed in the case of *Y v Austin Heath*¹⁹, in which Atkinson J treated the application as an interlocutory application for an injunction. While in *Re H v AE*²⁰ which was an application for the removal of sperm from a deceased spouse, it was treated according to the ordinary principles relating to the preservation of the subject matter of litigation, and therefore an order was granted for the extraction and subsequent preservation of the sperm.

(cc) *S v Minister for Health*²¹

In Western Australia the court granted an application for the removal and storage of sperm on a similar principle, viz the necessity to preserve the tissue pending an application for its use. It held that the conditions of S 22 & S 27 of *The Human Tissue & Transplant Act* ²² had been met, and that the sperm was deemed to be property for the purposes of the court rules and could thus be removed for preservation.²³

(dd) *Ex parte C*²⁴

The facts in this case mirror those of *Cresswell* in that you have the wife of a man who suffered from depression and who had committed suicide, seeking a court order to remove and store her late husband’s sperm.

Edelman J backed his decision to permit the removal of the sperm on the basis that the removal was permitted by the *Human Tissue and Transplantation Act* 1982 (WA) which stated that removal of sperm fell within the meaning of ‘medical purposes’ as outlined in s 22(1) (b) of the Act.²⁵

In his judgement, Edelman J held that the proper approach in such applications was for the applicant (wife) to seek the approval of a designated officer rather than to approach the Court.²⁶

¹⁷ See *Cresswell* at para 35

¹⁸ See *Re Cresswell* at para 36.

¹⁹ [2005] 13 VR 363

²⁰ [2012] 113 SASR 560

²¹ [2008] WASC 262

²² 1982 (WA)

²³ See also *Roche v Douglas Administrator of the Estate of Rowan* [2000] 22 WAR 331

²⁴ [2013] WASC 3

²⁵ *Ex parte C* at 5

²⁶ *Op cit* at 6

Brown J in *Cresswell* took note of Edelman's reliance on the provisions of s 22 (I) (b) of the WA Legislation and opined that any non-compliance with Queensland's TAA could affect the lawfulness of the order made in favour of Cresswell in the 24th August 2016 application for the removal of Joshua's sperm.²⁷

3.2 Summary to date.

(a) Brown J in *Cresswell* rejected the precedent of the Queensland cases in *Re Gray and Baker* and the Victorian case of *AB v Attorney General* which refused applications to withdraw sperm from a deceased male partner.

(b) Brown J instead preferred the precedent in the QLD case of *Re Denman* which also rejected the precedents in *Gray and Baker* to the effect that the court had no jurisdiction and that removal of sperm was an offence²⁸

3.3 Was the removal of sperm in *Cresswell* authorised by the TAA?

(a) Brown J's next order of business was to decide whether any non-compliance with the TAA could have affected the lawfulness of the earlier decision on 24th August 2016, which authorised the withdrawal of sperm from Joshua. This decision had the potential to affect the decision in the current application.²⁹

(b) If the TAA did not apply then the question became whether the order for removal was permitted by the common law or by the exercise of the inherent powers of the Court.

(c) Whether the court can decide the issue based on its inherent powers, in turn depends on whether sperm is capable of being classed as property.³⁰ The definition of Tissue in s 4 (1) (b) is defined to include a substance extracted from an organ, blood or part of a human body, which would include sperm or ova. The question then to be decided was whether the removal of the sperm was relevant for 'other medical or scientific purposes'. Furthermore, the court decided that s 22 (1) (a) was satisfied viz that Joshua Davies' body was in a hospital and that Dr. Byrne, the Executive Director of Medical Services, had approved the procedure for removal of the sperm.³¹

(d) Furthermore, the requirements set out in s22 (1) of the act were met in that the consent of the 'senior available next of kin' of the deceased, viz his partner Ms Cresswell, had been obtained. In addition to her consent, both Joshua's parents and the father of Ms Cresswell, also gave their consent. There were no parties recorded as objecting to the procedure, and Joshua had not in his lifetime expressed an objection to the removal of his sperm after his death.³²

²⁷ See Cresswell at 144

²⁸ See Cresswell at p 147

²⁹ See Cresswell at p 149

³⁰ See Cresswell at 10 para 149

³¹ Ibid at para 49

³² See para 55

(e) The next logical step to be determined was whether the proposed *use* of the sperm could be claimed to constitute ‘therapeutic purposes’ or amount to ‘other medical or scientific purposes’ as per s 22 (1) (c) (ii). The significance of this decision was that the purpose of the removal for preservation of the sperm could not be considered in isolation of the fact that there would be a further application to determine whether Ms Cresswell would be entitled to use the sperm for procreation purposes.³³

(f) If the court approved of Martin C J’s decision in *Russell v Weitz*³⁴ and found that the terms “‘therapeutic purposes’ or ‘medical purposes’ covered the removal of sperm, then authority for its removal would be required in terms of ss 22& 24 of the Act. On this point the court then found to its satisfaction that the consent of the next of kin had been acquired. The consent of the coroner as per s 2 R, had also been obtained.³⁵

(g) As a consequence of the above findings the court held that the sperm had been removed in terms of a court order and that such removal was lawful. This meant that the sperm could be used for any legitimate ‘medical purpose’.³⁶

3.4 Is the sperm property capable of being possessed?

Having held that the sperm had been lawfully removed, the court had next to decide whether Ms Cresswell was entitled to use the sperm of her late partner Joshua Davies. The court found that it lacked jurisdiction to decide the issue of use in terms of the principle of *parens patriae* and that there was no legislation dealing with the use of removed sperm where the donor was deceased.³⁷

The only alternative for the court was to decide this matter in terms of the common law relating to the notions that there was no property in a corpse.³⁸ However, two exceptions to this rule existed :-

(i) The personal representative had a right to the custody and possession of a body for purposes of burial or cremation.

(ii) Those who apply work and skill on a human body or part thereof³⁹ obtain thereby the right to possess or retain the body or body part thus processed.⁴⁰

By analogy thus, the doctors who remove the sperm from a deceased apply specialised work and skill to remove the sperm. They do so as the agents of the bereaved wife/partner. The latter thus

³³See para 59-64

³⁴ G L S v Russell-Weiss [2018] WASC 79

³⁵ ibid

³⁶ see para 85-86

³⁷ see para 98-99

³⁸ *Doodeward v Spence* (1908) 6 CLR 4016

³⁹ see para 99

⁴⁰ see para 98-99

acquires lawful possession of the sperm and may thus use the sperm thus obtained for the purposes of being inseminated.⁴¹

Another small incremental step in the legal evaluation of the common law towards recognising the right to ownership in human body parts was affirmed, albeit obiter, by Rose LJ in the case of *R v Kelly*⁴² in which the negligent appropriation of 40 body parts (straws of cryo-preserved semen) from the Royal College of Surgeons, was deemed to be theft because they were deemed to have become property by virtue of their removal having been consensual.

Ten years later the decision in *Yearworth & Ors v North Bristol NHS Trust*⁴³ opined that the decision in *Doodeward's* case was not a sound basis on which the common law could base the principles of ownership of body parts, because *Doodeward's* case was rooted in an exception to a principle. The judge on appeal was seeking to create a more solid legal basis for ownership rights in body parts, which was divorced from the flimsy rule of the application of 'work or skill' which lacked a sound basis in common law.⁴⁴

Admittedly the factual basis of *Yearworth's* case gave the court far more scope to apply the established principles of common law than did *Doodeward* and the series of cases discussed above. The ratio in *Yearworth's* decision was as follows:

- a) The plaintiffs (all cancer victims) were alive and consented to the removal of their sperm.
- b) Their semen was frozen with their consent.
- c) Their semen perished while in storage due to the negligence of the cryobank.
- d) The negligence was characterised as a breach of a bailment. The latter being a well-developed legal concept in the common law.⁴⁵

The court was therefore able to find that because the bailors had not abandoned the ownership of their sperm once they placed it in possession of the bailees, they therefore retained ownership thereof. The bailees could, furthermore, not deal with the bailed sperm without the consent of the bailors.⁴⁶

The court was therefore able to find that the men had an action for negligent damage to property and a breach of bailment. What we are able to extrapolate from *Yearworth's* decision is the fact that 'substances produced by a living person are in principle subject to the ordinary rules of property',⁴⁷

⁴¹ See para 105-110

⁴² [1999] QB 621

⁴³ [2010] Q B 1

⁴⁴ Cresswell para 117-121

⁴⁵ *ibid* [22]

⁴⁶ *ibid*

⁴⁷ *Clerk and Lindsell on Torts*, 3rd ed, Sweet & Maxwell 2009 at 29-021 See also Douglas, Hickey and Waring, *Landmark cases in Property Law*. Hart, 2015 at 25.

The finding in Yearworth's case that human tissue (in that case sperm) could be the subject of ownership was endorsed in the Australian case of *Roche v Douglas*.⁴⁸ in which Sanderson M held that tissue samples were property, given the fact that they had a real physical presence. Unfortunately, the judge did not specify whether he came to this conclusion based on the 'work and skill' notion in the Doodeward case, or not.

The finding in the case of *Bazley v Wesley Monash IVF Pty Ltd*⁴⁹ is more closely aligned to the Yearworth case and it answered the question posed viz whether sperm extracted and stored from a donor could be described as 'property' and consequently form part of the deceased's estate, in the affirmative. This finding was also firmly rooted in the common law institution of bailment. The deceased donor was characterised as the bailor and the IVF Clinic as a bailee for reward. The fee the latter received was for storing the straws of semen.⁵⁰

*Re Estate of Edwards*⁵¹ decided the issue of disputed ownership in sperm purely by reference to statute viz the provisions of the *Assisted Reproductive Technology Act* (2007) NSW which did not allow a widow to use her deceased husband's sperm for reproductive purposes in NSW. The judge noted that the *Human Tissue Act* 1983 (NSW) provided a statutory basis only for removal but⁵² did not address the question of the right to use the stored sperm.

The one positive aspect of the judgement was the willingness of Hulme J to exercise his discretion to grant the order sought on the grounds that no one else had any interest in the sperm. He granted possession but stressed that the Act barred the applicant from using the sperm to obtain assisted reproductive treatment in NSW. The Act requires the express consent of the deceased⁵³ to implant his sperm, for which use consent had not been acquired.

In *GLS v Russell – Weiss*,⁵⁴ Martin C J summed up the slow steady evolution of Australian Law towards recognising the right of property in a body part in the following terms viz that it does not follow from the traditional principle that because there is no property in a corpse, that there can likewise be no property in a part of that body.

4. Summary of Legislation in Australian States.

Legislation exists in Australia and New Zealand dealing with assisted reproduction. However, these regulations are contained in legislation relating to organ donation (retrieval) and their use is

⁴⁸ (2000) 22 WAR 331

⁴⁹ (2011) 2 Qld R 207

⁵⁰ *ibid*

⁵¹ (2011) 81 NSWLR 198

⁵² See at 140.

⁵³ See at s23 of the *Assisted Reproductive Technology Act* 2007 NSW

⁵⁴ (2018) WASC 79.

typically found in regulations contained in assisted reproduction legislation. There is no legislation in Australia dedicated to the removal and use of sperm.

a) Victoria

(i) Retrieval

Sperm can probably be retrieved posthumously under sections 26 & 27 of the Human Tissue Act 1982 (Vic)

(ii) Use

Written consent from the deceased must be produced and the consent of the Patient Review Panel obtained, before sperm can be used, see s46 of the *Assisted Reproductive Treatment Act* 2008 (Vic)

b) New South Wales

(i) Retrieval

The case of *MAW v Western Sydney Area Health Service*⁵⁵ held that the *Human Tissue Act* 1983 (NSW) does not authorise the harvesting of gametes from a deceased for the purpose of insemination.

(ii) Use

Written consent of the deceased is required to enable the use of his gametes.⁵⁶

c) South Australia

(i) Use

Section 9.1 of the *Transplantation and Anatomy Act*⁵⁷ stipulates that sperm can only be used posthumously if it was retrieved prior to the death of the person.

(ii) Retrieval

Prior consent given during the lifetime of the deceased is required.⁵⁸ Without such consent gametes may not be removed posthumously for use in reproduction in another living person.

d) Western Australia

(i) Retrieval

An 'authorised person' eg a hospital superintendent or a coroner may give permission for the removal of tissue from a dead body in their hospital if it is to be used for 'medical' or 'therapeutic purposes'. The latter would encompass insemination.

(ii) Use

In terms of s22 of the Human Reproductive Technology Act⁵⁹ unless the donor of the gametes consents to their use for reproductive purposes, the procedure is unlawful.

However, s28 of the Act details certain exceptions. In terms of the provisions of this section a medical practitioner who has applied for and been granted an exemption from the licencing procedure when the artificial insemination is carried out by prescribed persons in prescribed

⁵⁵ (2000) 49 NSWLR 231

⁵⁶ *Assisted Reproductive Technology Act* 2007 (NSW)

⁵⁷ 1983 (SA)

⁵⁸ S 91 *Assisted Reproductive Treatment Act* (SA)

⁵⁹ 1991 (WA)

circumstances, is exempted.

5. Brown J's Summary of the Law in Queensland

After her lengthy and detailed analysis of all the precedents and the applicable legislation Brown J summed up the state of the law in Queensland applicable to the removal and use of a deceased's sperm as follows:-⁶⁰

(i) She drew a clear distinction between sperm removal while a person is alive and sperm removal after his death.

The post-mortem removal of sperm without consent has the consequence that it cannot be classified as property and nor will it form part of the assets in a deceased's estate.

(ii) Section 22 of the TAA classifies sperm removed post-mortem for use in reproductive treatment as use for so called 'medical purposes'

(iii) The TAA in turn sanctions the removal of sperm authorised by the Coroner or by a designated officer e.g. a hospital superintendent, thus circumventing the necessity for a supreme court application.

(iv) Although Brown J could not find a common law principle to justify a court order to remove sperm from a deceased, if the provisions of the TAA were satisfied to the extent that it was being removed for 'medical purposes' then there is the probability based on 'the authority in *Ex parte M and S v Minister of Health (WA)* that sperm so removed is capable of being recognised as property. Therefore, a court seized of the matter may consequently have jurisdiction to make a preservation of property order.

(v) The 'work and skill' analogy from *Doodeward* could be applied to render sperm removed from a deceased as constituting property.

(vi) Brown J found some support for the notion that sperm could be designated as tissue separated from a human body. It could then be classified as a *res* which constitutes property capable of ownership, even without the exercise of work or skill. However, he held that those cases were limited to situations where separation had occurred while the donor was alive and had consented to the removal of his sperm.

(vii) The doctors and medical technicians who exercise the 'work and skill' to remove the sperm are the persons *prima facie* entitled to its possession, alternatively, and this will mostly be the situation, the principal on whose behalf they apply their work and skill, will acquire possession.

6. The Judgement

6.1 Introduction

Brown J's most thorough and detailed analysis of the range of precedent across the various state jurisdictions in Australia coupled with an examination of what the principles of common law and the various statutes added to the topic, all contributed to the fact that she had laid a solid

⁶⁰ Cresswell para 163

foundation on which to base her judgement. Every aspect of the judgement was well supported by the authorities he had cited and the principles she had identified.

It might be appropriate to sum up the facts on which her judgement was based:

- (i) Joshua Davies, the deceased, was in a relationship with Ms Ayla Cresswell. They were childless at the time of his death but had planned to have children.
- (ii) Joshua Davies had not consented to the removal of his sperm. Nor had he consented to its use in impregnating his erstwhile partner Ms Cresswell.
- (iii) After his sudden and unexpected death Ms Cresswell expressed the desire to become pregnant with Davies' sperm. His parents supported her in this endeavour. Hence the application which gave rise to this litigation⁶¹.

6.2 Findings

6.2.1 Possession of sperm

Joshua Davies' sperm was removed post-mortem, not in vivo, and without his consent. Therefore, the sperm could not be classified as his property, nor did it form part of his estate. However, by virtue of the removal of Davies' sperm and its storage in liquid nitrogen, 'work and skill' were applied by the laboratory staff at the Queensland Fertility Group. By virtue of the manner of its removal the legal nature of the sperm was so transformed that the stored sperm could now be classified as property and thus capable of possession by the entitled party. The entitled party's possession was qualified by the fact that the sperm had to be used for the purposes of treatment by way of assisted reproduction.⁶²

The judge further found that when applying their expertise, the laboratory staff who carried out the process of removal, were doing so as the agents of Ms Cresswell. Ms Cresswell was the only applicant seeking possession of Joshua Davies' sperm, and for this reason she thus had a prima facie entitlement to the sperm. Ms Cresswell sought relief by way of an order for permanent possession⁶³

6.2.2. The Courts Discretion to Grant the Relief sought.

As to the Court's discretion to grant the application, the Court held that given the fact that in the matter before it, the sperm had been removed by order of the Queensland Division of the Supreme Court by virtue of exercising its inherent jurisdiction. The Court therefore retained its control over the use of the sperm. By way of an obiter it opined that its discretion might not apply if the removal had been authorised by a designated officer under the provisions of the TAA.⁶⁴

6.2.3. Can sperm be legally used for assisted reproductive treatment?

Commonwealth Legislation specifies that only accredited Assisted Reproductive Centres may

⁶¹ Cresswell at para 163-167

⁶² Cresswell para 232 235

⁶³ ibid

⁶⁴ Cresswell para 168

provide IVF Services.⁶⁵ This is true for Queensland as well viz that only an accredited ART Centre may provide IVF services and in order to maintain its accreditation such centre must abide by the NHMRC guidelines.⁶⁶ Joshua Davies' sperm was in the possession of an accredited facility.

6.2.4 Consent of the deceased

The court ruled that Joshua Davies' autonomy was relevant to the exercise of its discretion, but also found that the deceased had not expressed any negative sentiments regarding the use of his sperm to father a child. As a consequence, s 22 (1)(b) of the TAA had been satisfied.⁶⁷

It also found that the only applicant for use thereof, Ms Cresswell, sought to use the sperm for purposes of impregnation and not for any other purpose.⁶⁸

6.2.5 Best Interests of the Child.

A factor which the court had perforce to take into account in its judgement was the real possibility that by granting possession of the deceased's sperm to the applicant it could result in a pregnancy and the birth of a child, and that placed an obligation on the court to consider whether the best interest of such child would be ensured by being born to the proposed mother, Ms Cresswell.⁶⁹

The court held that on the evidence led by Ms Cresswell, her father and Joshua's parents, it was satisfied that a child born into this family and a network of extended family and friends would be loved and well cared for. In addition, Ms Cresswell had in the intervening 2 years since Joshua's death undergone counselling to manage her grief and to test her resolve to proceed with IVF treatment based on conscious thought and not merely an emotional reaction.⁷⁰

7. Orders

- (i) That the applicant is entitled to the use and possession of Joshua Davies' sperm on the following conditions:-
- (ii) That upon the applicant (possessor's) direction the Queensland Fertility Group is to transfer said sperm directly to the Women's Health Only Clinic within 7 days of receiving written instructions from the applicant.
- (iii) The sperm may only be used for treatment procedures to create an embryo produced in combination with an oocyte or oocytes produced by the applicant.⁷¹

8. Conclusions

It is submitted that the strength of this judgement lies not only in its meticulous analysis of all

⁶⁵ *Research Involving Embryo's Act 2002* (cth) s11.

⁶⁶ Sections 8.22 and 8.23 of these guidelines specify how gametes are used posthumously.

⁶⁷ Cresswell para 178-189.

⁶⁸ *ibid*

⁶⁹ Cresswell para 194-207

⁷⁰ See NHMRC guidelines for ART Clinics

⁷¹ Cresswell para 236

relevant Australian authorities on post mortem use of sperm but also on its well balanced weighting of the interests of the wife/partner and those of the child possibly to be conceived by the use of the late Joshua Davies' sperm. The judgement has also provided clarity as far as the circumstances under which possession or ownership can be obtained in sperm which has been removed from a deceased partner without prior consent. Removal without consent is still tied to the Doodeward precedent which requires 'work and skill' to be applied to the removal in order to secure rights of possession.

The decision also highlights the importance of a partner's consent to removal being obtained during his lifetime, which obviates costly and time-consuming litigation regarding the surviving partner's right to use possession and ownership of the sperm.

Practical real-life circumstances are such that unexpected death can occur prematurely before written consents can be put in place. It is therefore submitted that the one document which may be usefully applied to pre-empt such a situation is a will drafted, prior to marriage and proactive practitioners would be well placed to suggest to young couples that they include the appropriate consents to post mortem use of a partner's sperm as a clause or clauses in their will.

The *Cresswell* case illustrated the role played by legislation viz. the Transplantation and Anatomy Act,⁷² the Research Involving Embryo's Act,⁷³ The Assisted Reproduction Technology Act,⁷⁴ the Human Tissue and Transplantation Act⁷⁵ and the NHMRC Guidelines,⁷⁶ in guiding Brown J's decision in *Cresswell*'s case.

Legislation inevitably brings about changes in entrenched aspects of human behaviour, which in the field of post-mortem use of sperm was that the consent of both husband and wife are required in order to procreate. This entrenched principle is in turn enshrined in the concept of parenthood espoused by all the major religions. On the other hand, it is law, not religion which must regulate human affairs. The social concept which has undermined the religious and ethical conservatism in most western societies particularly in the field of medicine, is the adoption of the principle of 'patient autonomy.' The latter is in turn driven by the insatiable demand to expand human rights, which receives even more impetus from the best interests of the patient test which is at the core of most areas of medical ethics. However, because the 'best interests of the patient test' varies from individual to individual it is a factor which will complicate the efforts of the legislature to achieve an objective and equitable outcome for all patients.⁷⁷

⁷² [2002] Qld.

⁷³ [2002] Cth

⁷⁴ (2007) NSW

⁷⁵ (1982) W.A.

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⁷⁷ A.I. Tauber *Patient Autonomy and the Ethics of Responsibility* (2005) MIT Press. M Sutrop 'Changing the Ethical Frameworks: From Individual Rights to the Common Good'. (2011 20 *Cambridge Quarterly of Healthcare Ethics* 533- 545

9. Comparative Law

The cases discussed below illustrate how a number of other jurisdictions around the world have regulated post mortem use of sperm. This allows us to draw parallels with the *Cresswell* case.

9.1 United Kingdom

9.1.1. *R v Human Fertilization & Embryology Authority: ex Parte Blood*.⁷⁸

The many faceted decision in the Diane Blood case is the leading UK authority on the post-mortem use of a deceased spouse's sperm.

The HFEA Act⁷⁹ denied Diane access to her late husband's cryopreserved sperm obtained without his consent. She challenged their ruling on the basis of patient autonomy and her human right to found a family. The Act was norm based and claimed to reflect the current morals prevalent in English society. The provisions of the Act forbade the posthumous removal, storage and use of a husband's gametes without his written consent.

9.1.2. Facts of the Blood Case

Two months after trying to start a family with his wife Diane, Stephen Blood contracted meningitis. He lapsed into a coma and died within days, without consenting in writing for his gametes to be removed, stored and used by his wife.

Doctors at the hospital treating Stephen, had on Diane's request, removed gametes from Stephen and entrusted them to the Infertility Research Trust. After his death the Trust sought a ruling from HFEA as to whether it would be legal for the Trust to store gametes taken from a man on a life support system without his written consent.⁸⁰

9.1.3. The Legal Process

a. HFEA's decision

The Authority ruled that the Trust would be acting unlawfully were it to store Stephen Blood's gametes. Its ruling was based on s3 of the Act which stipulated that the Trust required written consent from Stephen which had not been obtained prior to his death.⁸¹ The Authority also rejected Diane's submission that it should infer consent from the fact that she and her husband had agreed to have children and embarked on fertility treatment together.⁸²

The Authority further decided that Diane Blood's intention to use her late husband's sperm in order to be inseminated would be unlawful.⁸³

⁷⁸ [1999] Fam 151 Judgement 1. [1999] Fam 151 Judgement 2.

⁷⁹ Human Fertilization & Embryology Act 1990 UK updated in 2008.

⁸⁰ See schedule 3 (2) of the Human Fertilization and Embryology Act 1990 UK (as it then was). Since updated in 2008. See also the Human Tissue (Retention & Transplant Act (2004) UK. Section 5 deals with consent.

⁸¹ See schedule 3, para 1 'Consent to use of Gametes'

⁸² See para 3 of schedule 1

⁸³ See para 5 of schedule 1

b. High Court application for judicial review

Diane Blood applied to the High Court for a judicial review of the HUFEA decision on the following grounds:-

- (i) The Authority had failed to exercise its authority in terms of s 24 of the Act. This section allows sperm to be exported to a country which does not require written consent for its use.
- (ii) Articles 59 and 60 of the European Commission required a member state (UK) to permit the export of any resources necessary for medical treatment. The Authority had not provided any justification for its decision other than its reference to Schedule 3 of the Act.

b.b Decision of the High Court on Review.

The court held that:-

- (i) E C Law did not assist Diane Blood.
- (ii) The requirements of written consent in the HUFEA Act was sufficient to prove that the matter was rooted in U.K. national public policy and ethical values.
- (iii) The authority had the power to decide the matter, and that its decision was within the limits of its discretion.

c. Court of Appeal

Diane Blood subsequently appealed the unfavourable review delivered by the High Court to the Court of Appeal, which held as follows:-

- (i) That the Trust had acted unlawfully in taking and storing Stephen Blood's gametes.
- (ii) That Articles 59 and 60 EC were directly enforceable in English Law.
- (iii) If the provisions contained in Articles 59 & 60 had been applied, Diane Blood should have been granted permission to export her late husband's sperm.
- (iv) The matter was referred back to the Authority to reconsider its decision in the light of the above.⁸⁴

d. Revised decision by HUFEA

The Authority duly reconsidered its earlier decision and granted Diane Blood an export licence (to Belgium) for her late husband's gametes. She was subsequently impregnated with her late husband's sperm in Belgium and gave birth to two much loved children.⁸⁵

9.2 France

⁸⁴ Blood Case, [1997] 2 AH ER 687 at 703, 704

⁸⁵ [1999] Fam 181

9.2.1. *Parpalaix v Cecos*⁸⁶

(a) Facts

Husband Alain died of testicular cancer just two days after marrying his wife. Prior to his death he had deposited 9 vials of sperm with Cecos (a storage facility). Alain left no specific instructions with Cecos regarding the use of his sperm, nor did he leave a written consent as to who was entitled to use his sperm for insemination purposes.

After his death his young widow sought access to her deceased husband's sperm from Cecos. They refused to release it to her on the grounds that no proper consent had been given.

(b) Litigation

His widow sought an order compelling Cecos to release the sperm to her. She argued that:-

(i) Alain had a contractual right to the sperm he had deposited. This submission was rejected.

(ii) Alain had personally deposited his sperm with the intention of using it in future. This submission was successful, despite the fact that there was no evidence on this point from Alain. His intention (to use the sperm) was accepted on the strength of the testimony of his wife and his parents. The court construed intent from the evidence led relating to the strength of their family ties and the family's solidarity on the matter.

The French court demonstrated a greater degree of flexibility in deciding the issue than the British courts had done in the Blood case. A major point of distinction, however, was that in *Parpalaix* the husband had deposited his own sperm.

9.3 *United States*

9.3.1 *Hecht v Superior Court of California*⁸⁷

William Everett Kane was a California solicitor. Prior to his death he deposited 15 vials of his sperm with a Californian Cryobank. In his will he bequeathed all his right and interest in his sperm to his partner Deborah Ellen Hecht. His will also contained a clause in which he authorised the cryobank to release his semen to Hecht or her physician upon request.

A letter addressed to his future posthumous children was found after his death. This document provided evidence of his procreative intent. The litigation arose out of the fact that Kane's two teenage children from a previous marriage sought a court order to have their father's sperm destroyed on the ground that the instructions in his will violated traditional family values. In the court-a-quo the application was successful, and the court ordered the destruction of the sperm within 60 days.

Hecht successfully opposed this ruling. The court held that sperm could be classified as property, albeit of a unique kind, and could therefore be disposed of in a will. The court ruled that Hecht could thus be a beneficiary of Kane's will and could lawfully use Kane's sperm to procreate. This case mirrored the *Parpalaix* case, in that the procreative intent of the deceased was deemed to be the determining factor. Because he was a solicitor, Kane was alerted to the legal requirements he

⁸⁶ Gaz. Pal (1984) 2 e sem jur 560

⁸⁷ 1993 (16) Cal. App. 4th 836

needed to fulfil in order to facilitate Hecht's access to his sperm. The documentation therefore included his express written consent to Hecht in which he sanctioned her use of his sperm for procreational purposes.

Thus, given the fact that there were no chinks in Kane's legal armour his children had no other avenue of attack than to challenge his bequest on ethical grounds as being in a conflict with the structure of a traditional nuclear family.

The court rejected the children's case, citing the fact that there had been a natural evolution of ethical values in modern society, and their attempt to resurrect the nuclear family structure was a futile attempt to shore up a fortress that had long since been breached.

10. Legislative regulation

Due to the often-erratic decisions of the courts on the issue of the post-mortem use of an individual's gametes a number of jurisdictions have decided to create certainty and uniformity via legislation.

For example, Germany, Sweden, Canada and the state of Victoria in Australia have legislated to prohibit posthumous assisted reproduction. Western Australia has regulations which forbid the posthumous use of gametes.⁸⁸

Israel has legislation regulating the use of pre-embryos which sanction their transfer to a wife within 1 year of her husband's death, even in the absence of his consent. In the event of the wife's death the pre-embryo may not be used.⁸⁹

In the UK a man's prior written consent is required before a licensed storage facility may accept his sperm for storage. This consent would thus also have to cover post-mortem retrieval, storage and insemination.⁹⁰

In France, after the Parpalaix case, CECOS adopted an explicit policy of refusing post-mortem insemination, and this policy was subsequently upheld by the French Courts.⁹¹ In 1994 France went one step further and passed a law forbidding posthumous insemination.⁹² By way of contrast to most of the countries above, Belgium and the USA have taken a more liberal approach by permitting post-mortem insemination without the deceased's prior written consent.⁹³

⁸⁸ G Bahadur 'Posthumous assisted reproduction' cancer patients, potential patients, counselling and consent' (1996) *Human Reproduction* (2) 573-2 575.

⁸⁹ A Benshushan & JG Schenker 'The right to an heir in the era of assisted reproduction' (1998) 13 *Human Reproduction* 1407-1410

⁹⁰ See *Human Fertilisation and Embryology Act* 1990.

⁹¹ Aziza – Shuster 'A child at all costs' posthumous reproduction and the meaning of parenthood' (1994) 9 *Human Reproduction* 2182-2185.

⁹² J Lansac 'French Law concerning medically assisted reproduction' (1996) *Human Reproduction* 1843-1847

⁹³ D Brahams 'A unique case of frozen sperm export' (1997) *Lancet* 349, 448.

Conclusion

Are the interests of a grieving partner and other family members of a deceased male partner best served by legislation requiring written consent to withdraw, store and use the deceased's sperm? A decision to remove and cryopreserve a deceased's sperm must be taken within 24 hours. A very short window of opportunity. This decision must be taken when the surviving partner's grief is most raw, and she finds herself in a situation where she is seeking consolation of any sort. Having a child by her deceased partner would constitute such consolation. It would give her something tangible to cling to. The grieving partner is also likely to receive strong support from the parents and family of her deceased partner, who likewise seek a form of consolation.

These compelling personal circumstances do not lend themselves to making rational well-informed decisions and therefore the circuit breaker of prior written consent is probably a sensible legal requirement which defuses the surges of emotion which can affect such decisions. A requirement of prior written consent would result in hard cases, see for example, the Diane Blood case, but then as the old adage goes 'hard cases do not make good law.'

My final submission would thus be that the interests of all concerned viz. society and the grieving widow, would be best served by the certainty of legislation and not the lottery with which case law has left us.